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No. 86-651

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO and OUACHITA LOCAL 654,
Petitioners

v.

MISCO, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed parties have an interest in the outcome of this case.

MISCO, INC.

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SUMMARY OF ARGUMENT

The Petition For Writ of Certiorari should be denied because no circumstances falling within the ambit of United States Supreme Court Rule 17 are shown to exist. There is no conflict among the Circuit Courts of Appeals in their application of the "public policy" exception when it is clear that the public policy involves matters of public safety. The decision below in Misco, Inc. was a proper exercise of the "public policy" exception in that the Occu-

pational Safety and Health Act, 29 U.S.C. § 651-678, the criminal laws of the State of Louisiana at Louisiana Revised Statutes 40:966(D), and the Controlled Substances Act of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 *et seq.* provide explicit public policy upon which to predicate the vacation of an arbitration award. Additionally, the arbitration award in this case was so irrational as to be arbitrary and capricious and does not merit the attention of the United States Supreme Court.

ARGUMENT

There Is No Conflict Among The Circuit Courts Of Appeal In Their Application Of The "Public Policy" Exception To Matters Of Public Safety

Respondent asserts that no conflict among the Circuit Courts of Appeals exists for the reasons set forth below. There is clearly no conflict when the issue is presented in terms of *public safety* as the public policy consideration. Further, under any view, the award would have required the employer to violate a law (The Occupational Safety and Health Act), and thus, the instant case would be in conformance with any definition of public policy.

Only two of the decisions of the Courts of Appeals relied upon by Petitioner in its quest for a conflict among the Circuits dealt with public policy insofar as it embodied considerations of *public safety.* The first case was the present case before the Court, *Misco, Inc. v. United Paperworkers International Union,* 768 F.2d 739 (5th Cir., 1985). The second case was *E. I. Dupont DeNemours v. Grasseli Emp. Assoc.,* 790 F.2d 611 (7th Cir., 1986) cert. denied, —— U.S. —— (Oct. 6, 1986), which was basically aligned with the *Misco* decision and is discussed below. The cases allegedly in "direct conflict" with the Misco public safety rationale involved nonanalogous issues of public policy. In *American Postal Workers Union v. United States Postal Service,* 789 F.2d 1 (D.C.

Cir. 1986), the arbitrator's award which was enforced involved not public safety, but reinstatement of a dishonest postal employee. In *Bevles Co., Inc. v. Teamsters Local 986*, 791 F.2d 1391 (9th Cir., 1986), pet. for cert. pending, No. 86-431, the arbitration award enforced by the Court involved the reinstatement of undocumented aliens, not public safety.

The undersigned has found no cases where the District of Columbia Circuit has considered public policy relating to *public safety* in the context of a suit to vacate an arbitration award. Moreover, the District of Columbia Circuit, in our view, does not limit the public policy exception to those cases where the award violates a law or compels unlawful actions. In *Office and Professional Employees International Union v. Washington Metropolitan Area Transit Authority*, 724 F.2d 133, at 140 (D.C. Cir. 1983), the District of Columbia Circuit stated, "Additionally, courts will not enforce an award that is contrary to law *or* explicit public policy." (Emphasis supplied) And admittedly that Circuit noted the narrow scope of the public policy exception in *United States Postal Service v. Nat. Ass'n of Letter Carriers*, 789 F.2d 18 (D.C. Cir., 1986), as discussed by Petitioner in footnote 6 at page 11 of its Petition. However, the Court then went on to *consider* the Postal Service's broader public policy argument that the Postal Service's operations "are not to be subjected to a patchwork of conflicting state laws." *Id.* at 20, 21. The Court stated:

> "The arbitrator's decision does not threaten to impair postal operations by subjecting the Postal Service to the dictates of all state and local laws. It applies one Tennessee statute to a small class of employees at one post office; it has no precedential value as an interpretation of the management rights clause . . . Thus, while we acknowledge the validity of the government's concern over the public policy ramification of allowing Postal Service operations to be impaired by conflicting state and local laws, we

conclude this policy is not implicated in the unique circumstances of the case." *Id.* at 20, 21.

Based upon the foregoing, it is submitted that the District of Columbia Circuit's treatment of the public policy exception is broader than merely the ascertainment of whether an award is unlawful or whether an award mandates illegal conduct and that no conflict among the Circuit Courts exists based upon any decision of the District of Columbia Circuit.

Moreover, the Ninth Circuit's decisions are not in conflict with *Misco, Inc.* The Ninth Circuit Court Of Appeals *has* considered public policy related to insuring the *safety of air travel.* It affirmed the vacation of an arbitration award which called for retraining and requalifying a pilot whose judgment had deteriorated to the point where he posed a threat to life. The case was *World Airways, Inc. v. International Brotherhood of Teamsters, Airline Division,* 578 F.2d 800 (9th Cir., 1978). This case predated this Court's decision in *W. R. Grace & Co. v. Rubber Workers,* 461 U.S. 757 (1983), which enunciated the "public policy" exception to enforcement of an arbitration award. In *World Airways,* the Ninth Circuit Court of Appeals looked to statutory and judicial recognition of the "duty resting upon air carriers to perform their services with the highest degree of safety in the public interest." 49 U.S.C. § 1421(b)(1970). It recognized that "regulations promulgated pursuant to the Federal Aviation Act established that it is the duty of the carrier to determine the competency of its pilots in the interests of public safety taking into account such things as 'personal characteristics that could adversely affect safety'." 14 C.F.R. § 121.413(4)(ii). It further noted that the Civil Aeronautics Board in an accident report stated that "Safety in air transportation requires the air carrier . . . to identify those pilots who are marginal or who demonstrated a failure to adhere to proven procedures and reassign them to duties compatible with their

capabilities and limitations." The Ninth Circuit also recognized that failure of an airline to comply with provisions of the Federal Aviation Act and its regulations can result in administrative and civil penalties. *Id.* at 803, The Court then stated:

> "Thus, federal law clearly places the responsibility upon the airline to determine whether or not a pilot possesses the judgment to serve as a Pilot-In-Command. The Arbitrator usurped this responsibility. Although the federal policy of resolving labor differences by arbitration is strong, there is also a strong federal policy in ensuring the safety of air travel. In weighing these concerns, we cannot overlook the horrible toll in human life that air crashes can take.
>
> After careful consideration of the briefs and oral argument, we hold that the District Judge has correctly balanced the competing federal interests here in determining that under these unusual circumstances, the Arbitrator exceeded his authority." Id. at 803, 804.

Based upon the foregoing it is clear that rather than being in conflict with the Fifth Circuit's holding in *Misco, Inc.*, the Ninth Circuit would applaud the reasoning of the Fifth Circuit.

The First Circuit case alleged by Petitioner to be aligned with the Fifth Circuit in a state of conflict with the District of Columbia Circuit and the Ninth Circuit did not involve public policy considerations of safety. Only the reinstatement of a convicted embezzler, not safety, was involved in *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822 (1st Cir., 1984).

Public safety was considered as it pertained to the reinstatement of an employee who had had a mental breakdown and engaged in certain violent conduct in the Seventh Circuit case cited by Petitioner as aligned with the

Fifth Circuit. *E.I. Dupont DeNemours v. Grasseli Emp. Ass'n*, 790 F.2d 611 (7th Cir. 1986), cert. denied, —— U.S. —— (Oct. 6, 1986). The Seventh Circuit considered whether safety as a public policy should bar reinstatement of the violent employee. It assumed that workplace safety was a valid public policy and noted that the arbitrator had "explicitly considered danger to company employees and property but concluded that these dangers were not significant since the likelihood of a future mental breakdown by [the grievant] is remote . . .". It further stated that "we are not empowered to review either his factual finding that the liklihood of a future mental breakdown by [the grievant] is remote or his judgment that the remoteness of a future breakdown renders any possible danger to workplace safety inconsequential." *Id.* at 615. So rather than generating a "deleterious effect on the national labor policy" (see Petition For Writ at 16), the Seventh Circuit affirmed the conclusiveness of an arbitrator's findings of fact, thus *advancing* the national labor policy. It should be noted that in *E. I. Dupont*, the arbitrator considered the public policy issues related to reinstatement. In *Misco, Inc.*, the arbitrator *ignored* the employer's argument that reinstatement was inappropriate.

Thus, the Fifth, Seventh and Ninth Circuits have recognized that public safety is a valid public policy. Clearly, when the issue is presented in terms of recognition of *public safety* as public policy, no conflict exists among the circuits, and this Court should not grant the Writ.

The Misco Decision Was A Proper Exercise Of The "Public Policy" Exception

In *W. R. Grace & Co. v. Rubberworkers*, 461 U.S. 757 (1983), this Court stated, as noted by Petitioner, that ". . . If the contract as interpreted [by the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. *Heard v. Hodge*, 334 U.S., at

35. Such a public policy, however, must be well defined and dominant, and is to be ascertained 'by reference to the laws and general precedents and not from considerations of supposed public interests'." Citation omitted. 461 U.S. at 766.

Judge Tom Stagg in the Western District of Louisiana highlighted the company's rules prohibiting drug use or possession as a valid expression of public policy:

> "Misco operates a paper converting facility. Hazardous industrial equipment is crucial to the operation of this facility. Grievant was employed as a slitter/rewinder operator. This machine is considered particularly hazardous because it features sharp edges required to cut rolling coils of paper. The danger inherent in operation of this machine has resulted in 10 to 15 accidents over the past four years at the Misco facilities. The company contends that the use of intoxicants impedes the judgment and coordination of hazardous equipment operators, thus increasing the likelihood of accidents. For this reason the company has a strong policy which prohibits the possession or use of drugs or alcohol on company premises." (See Petitioner's Appendix C, at 17-a.)

The Company had a valid rule prohibiting the possession or consumption of intoxicants, narcotics or controlled substances on the plant premises and had experienced violations of this rule in the form of finding empty beer cans, whiskey bottles, and the remains of marijuana cigarettes on the company's premises. The company held employee meetings stressing the company's prohibition rule, made spot checks to find violators on the night shift, and the production manager lived on the premises to observe offenders. The grievant had been previously reprimanded for judgmental errors not uncommon for one under the influence of narcotics or intoxicants. (Petitioner's Appendix C, at 18-a.)

Thus, as noted in Misco's Brief to the United States Court of Appeals for the Fifth Circuit (Respondent's Ap-

pendix A, Argument portion of Fifth Circuit Brief), the company's policy and rules were in accord with the dictates of national safety policy as exemplified by the Occupational Safety and Health Act, 29 U.S.C., § 651-678, (OSHA) particularly Section 654, which states as follows:

> "(a) Each employer—
>
> (1) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
>
> 2) Shall comply with occupational and safety health standards promulgated under this chapter.
>
> (b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct."

The obvious application of OSHA to reinstatement awards in violation of public policy was also pointed out in *E. I. Dupont DeNemours v. Grasseli Emp. Assoc.*, 790 F.2d at 615. Thus, an employer's *duty* to provide a safe working environment as required by OSHA is a strong public policy and a strong law which would be contravened by the enforcement of an arbitration award which reinstated a rule-violating drug user, who had been reprimanded for judgmental errors, to operating hazardous equipment. Respondent submits that public safety is a public policy cognizable under *Grace* as a result of the clear congressional mandate of the Occupational Safety and Health Act. This Court recognized the important policies behind the enactment of OSHA in *Industrial Union Dept. v. American Petroleum Institute*, 448 U.S. 607, 100 S.Ct. 2844 (1980). Thus, reinstatement in this case would require the employer to take an action in violation of his obligation to provide employ-

ment "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654.[1]

Additionally, public policy is found in the criminal laws of the State of Louisiana at Louisiana Revised Statutes 40:966(D) which provide that the possession of marijuana is a crime punishable by fines and imprisonment ranging from six months for a first offense to twenty years on a third conviction.

Moreover, in addition to federal safety policy and state criminal policy, federal criminal policy prohibits the possession and use of controlled substances. The Controlled Substances Act was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub.L. 91-513, 84 Stat. 1242, 21 U.S.C. § 801 *et seq.* (1970), which was designed to strengthen law enforcement efforts in the ever expanding area of drug abuse. See *U.S. v. One 1977 Cadillac, etc.*, 64 F.2d 500, 502 (5th Cir., 1981). Federal policy as stated in the Controlled Substances Act at 21 U.S.C. § 801(2) is as follows:

> "The illegal importation, manufacture, distribution and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people."

Clearly, explicit federal and state policy exists with respect to health and safety and is a valid basis for the exercise of the "public policy" exception by the Fifth Circuit Court of Appeals in *Misco, Inc.*

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[1] If one assumes that reinstatement would be in breach of an employer's legal obligation under OSHA to provide a safe work place, the *Misco, Inc.* treatment of the "public policy" exception clearly falls within the narrow definition of the public policy exception urged by Petitioner, i.e., that the award must require violation of a law before the exception applies.

Recognition Of Public Safety As A Public Policy Exception Is In Accord With Federal Labor Policy

National labor policy upholds employer disciplinary efforts to prohibit the illegal use of drugs in the work place. The National Labor Relations Board consistently upholds employer efforts to discipline and discharge because of the illegal use of drugs, not withstanding allegations the discharges were motivated by union activities. See *M.A.N. Truck & Bus Corp.*, 272 NLRB No. 201 (1984); *Howard Press*, 265 NLRB No. 181 (1982); *Local One, Amalgamated Lithographers v. NLRB*, 729 F.2d 172 (2nd Cir., 1984); *Laredo Coca-Cola Bottling Co.*, 258 NLRB No. 69 (1981). See also *NLRB v. Dixie Motor Coach Corp.*, 128 F.2d 201 (5th Cir., 1942), cited by the Fifth Circuit in *Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122 (5th Cir., 1983).

The Arbitrator's Award Was Fundamentally Irrational And Arbitrary And Does Not Merit The Attention Of This Court

The *Misco* award was so irrational that it does not merit the attention of this Court. The panel opinion below noted that the arbitrator's opinion was "perhaps most kindly described as whimsical." (Petitioner's Appendix A, at 1-a). The Court noted the irrationality of the arbitrator's opinion in that "The arbitrator informed the parties that he is a Creek American Indian.", and in that he criticised the employer for not utilizing "some higher, detached company official" to investigate the incident, completely ignoring the fact that the investigation was directed by the President of the company, and assisted by the Production Supervisor. The arbitrator's award concluded, incredibly, that an immediate discharge for drug use "was not reasonable because another stated ground for discharge was unauthorized reading on duty." (Petitioner's Appendix A, at 1-a, 2-a) Other irrational aspects of the arbitrator's opinion are noted at footnote 2 of the Petitioner's Appendix 3-a. The Court below did

not point out that although the employer argued to the arbitrator that the grievant should not be reinstated because of unfitness and policy considerations with respect to plant safety (Petitioner's Appendix A, 41-a), and although the arbitrator noted (albeit imperfectly) the employer's position with respect to reinstatement (Petitioner's Appendix A at 41-a), the arbitrator ignored the issue completely in his 33 page opinion. The arbitrator simply did not do his job and chose "to dispense his own brand of industrial justice." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

Thus, while the decision below was based upon the "public policy" exception, it could have been based upon the fundamental irrationality or arbitrariness and capriciousness of the award or the award's exceeding the powers of the arbitrator under *World Airways, Inc., supra.* The District of Columbia Circuit Court Of Appeals stated that the first inquiry a court may make in these cases is "Was the award arbitrary and capricious?" *Office and Professional Employees International Union, Local 2 v. Washington Metropolitan Area Transit Authority,* 724 F.2d at 140. Respondent Misco, Inc. submits that the arbitrator's award in this case was clearly arbitrary and capricious, and was so irrational that no court would have enforced it, that the result below is correct, and therefore, that it does not have the national significance that would merit the attention of the United States Supreme Court.

CONCLUSION

Respondent submits that this case does not merit the granting of a Writ of Certiorari because there is no conflict among the Circuits with respect to the application of the "public policy" exception when matters of public safety are involved. Further, there is no conflict among the Circuits even under the Petitioner's approach because OSHA makes it unlawful for an employer to provide an unsafe workplace. The application of the "public policy"

exception by the Fifth Circuit to the Misco, Inc. facts was proper and well reasoned. The arbitration award itself is so irrational, arbitrary and capricious, as to be unenforceable by any court, and does not merit the attention of this Court as a case of national significance.

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